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TAXATION

by

Glen A. Rosenbaum*

I. ADMINISTRATIVE PROCEDURE AND TEXAS REGISTER ACT

As was noted in last year's *Survey* Article,¹ the enactment of article 6252—13a, the Administrative Procedure and Texas Register Act,² created uncertainties relating to the litigation of state tax cases. Few of these uncertainties were resolved during the current survey period.

In *Robinson v. Bullock*³ the Austin court of civil appeals held that the district court was without jurisdiction to decide the merits of a taxpayer's action to enjoin the collection of state and local sales taxes where the taxpayer failed to pay such taxes under protest pursuant to article 1.05⁴ prior to filing suit. The taxpayer had been granted an administrative redetermination hearing before the comptroller. After the comptroller issued an adverse decision and denied the taxpayer a rehearing, the taxpayer filed suit in district court, relying upon the Register Act for authority to bring suit.⁵ In ruling that the district court had no jurisdiction to entertain the taxpayer's request for injunctive relief, the court reasoned that the protest statute provides a special method enabling taxpayers who questioned the validity of a tax to bring suit against the state in an effort to recover taxes paid under protest. Since the protest statute created a right not existing at common law and prescribed a remedy to enforce that right, the courts could act only in the manner provided by the statute.⁶ Concluding that there was no repugnancy between the protest statute and the Register Act, the court rejected the taxpayer's argument that the general repealer clause in the Register Act⁷ repeals the protest statute by implication.⁸

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1. Burke, *Taxation, Annual Survey of Texas Law*, 31 Sw. L.J. 435, 438 (1977).

2. TEX. REV. CIV. STAT. ANN. art. 6252—13a (Vernon Supp. 1978) [hereinafter referred to as the Register Act].

3. 553 S.W.2d 196 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

4. TEX. TAX.-GEN. ANN. art. 1.05 (Vernon 1969).

5. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19(a), (b) (Vernon Supp. 1978) provides:

(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this Act. This section is cumulative of other means of redress provided by statute.

(b) Proceedings for review are instituted by filing a petition within 30 days after the decision complained of is final and appealable.

6. 553 S.W.2d at 197.

7. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 22 (Vernon Supp. 1978) provides as follows:

Chapter 274, Acts of the 57th Legislature, Regular Session, 1961, as amended (Article 6252—13, Vernon's Texas Civil Statutes), and all other laws and parts of laws in conflict with this Act are repealed. This Act does not repeal any existing statutory provisions conferring investigatory authority on any agency, including any provision which grants an agency the power, in connection with investigatory authority, to take depositions, administer oaths or affirmations, examine witnesses, receive evidence, conduct hearings, or issue subpoenas or summons.

8. 553 S.W.2d at 198.

An unexplainable aspect of the decision is that the court relied solely on the protest statute and totally ignored the Limited Sales, Excise and Use Tax Act.⁹ One provision of that act specifically prohibits the issuance of an injunction to enjoin the collection of sales and use taxes.¹⁰ Another provision states that a taxpayer's filing of a claim for refund with the comptroller is a condition precedent to the filing of suit for the recovery of sales and use taxes.¹¹

The Limited Sales, Excise and Use Tax Act is the only state tax statute which provides a procedure whereby a taxpayer may initiate a refund suit to recover taxes that were not paid under protest.¹² Thus, unless the provisions of the Register Act governing judicial review are applicable to refund actions involving state taxes, there is no procedure whereby a taxpayer may initiate a refund suit to recover taxes, other than sales and use taxes, which were not paid under protest. This issue was recently litigated in *Contran Corp. v. Bullock*.¹³ In *Contran* the surviving corporation in a merger transaction filed suit contending that it was entitled to a refund for the franchise taxes paid by the dissolved corporation prior to the merger. The suit was filed pursuant to the Register Act after the corporation's claim for refund had been denied by the comptroller. The attorney general filed a plea to the jurisdiction on the ground that the taxes for which the surviving corporation demanded a refund had not been paid under protest. After a trial on the merits, the district court ruled that the taxpayer corporation was not entitled to the relief sought. The court, however, left the issue unresolved by failing to state whether its decision was based on the jurisdictional question or the substantive question.

Another unresolved issue is whether the manner of judicial review of state tax cases is by trial *de novo* or under the substantial evidence rule.¹⁴ In

9. TEX. TAX.-GEN. ANN. art. 20.10 (Vernon 1969).

10. *Id.* art. 20.10(F).

11. *Id.* art. 20.10(G)-(I). Interestingly, Comptroller's Sales Tax Ruling .045(3) provides that payments made under protest will not be placed in a suspense fund but will be deposited in the same manner prescribed for other payments on the ground that the protest statute is not applicable to the Limited Sales, Excise and Use Tax Act.

12. TEX. TAX.-GEN. ANN. art. 20.10(G)-(I) (Vernon 1969).

13. Civ. No. 243,358 (Dist. Ct. of Travis County, 53d Judicial Dist. of Texas, Oct. 5, 1977).

14. This issue was summarized in the *Report of Committee on Administrative Practice*, 10 STATE BAR OF TEXAS, NEWSLETTER OF THE SECTION OF TAXATION, No. 1, Oct. 1976, at 12, as follows:

The point to remember is the Attorney General's office has taken a firm position that the money must be paid in prior to judicial review and that the only judicial review authorized is pursuant to Article 1.05 the 'protest statute.' Assuming that the Attorney General's position is correct, i.e., that the protest statute is the 'method provided by law for review' of tax cases, then it would seem to logically follow that the protest statute provides for trial *de novo*—it certainly has been so applied by the District Courts of Travis County in the past. The administrative action, to-wit, the Comptroller's Certification of tax due has previously, by statute, given rise to a *prima facie* case that the tax is due and the burden is on the taxpayer to show in what manner the Comptroller has unlawfully demanded the payment of tax. However, the taxpayer has been able to show this in the past through the evidence presented at the trial of the case on merits and the previous administrative action is only part of the relevant evidence considered. On the other hand, a strong case can be made that Article 1.05 does not specifically refer to trial *de novo*. Therefore, the law being silent as to the type of judicial review authorized, the case will be tried under the substantial evidence rule. Insofar as the Committee on Administrative Practices is aware, no decision has been reached as to the position that the Attorney General might take on this issue. However,

*Computer Language Research v. Bullock*¹⁵ the taxpayer instituted suit to recover sales and use taxes paid under protest. In a preliminary hearing the taxpayer contended that, although the taxes were paid under protest pursuant to article 1.05,¹⁶ the case should be tried on the basis of the substantial evidence rule according to the provisions of the Register Act. The attorney general took the position that the comptroller was not subject to the Register Act. The court held that the means of appeal available in the case was trial *de novo*.¹⁷

The uncertainties surrounding the applicability of the Register Act to state taxes would best be resolved by additional legislation. Such legislation should set forth specifically the jurisdictional basis for seeking judicial review of a contested state tax case as well as the manner of review. Legislation is also needed to authorize refund suits by taxpayers who remit taxes to the comptroller without protest. In the absence of such legislation years of protracted litigation may be required in order to fully resolve these issues.

Pending resolution of these issues, caution dictates that taxpayers involved in state tax litigation comply with the requirements of both the protest statute and the Register Act. Taxpayers filing suit for the recovery of sales and use taxes should also comply with the requirements of articles 20.10(G)-(I).¹⁸ Furthermore, proceedings at the administrative hearings level should be conducted under the assumption that judicial review will be on the basis of the substantial evidence rule.

II. FRANCHISE TAXES

The allocation of a corporation's taxable capital to Texas is an issue frequently litigated.¹⁹ *General Dynamics Corp. v. Bullock*²⁰ involved the question whether the gross receipts from a corporation's operations within a federal enclave in Texas should be classified as gross receipts from business done in Texas. Although General Dynamics conducted business at several locations in Texas, the majority of its operations occurred on a federal enclave in Tarrant County. The corporation sought to recover the portion of the state franchise taxes paid with respect to its activities within the enclave.

The Buck Act²¹ permits a state to collect an "income tax" on business activities conducted within federal enclaves. The Act defines the term

the careful attorney, using an abundance of caution, would proceed with the case at the administrative level on the assumption that it would be reviewed as a case 'other than by trial *de novo*.'

15. Civ. No. 254,647 (Dist. Ct. of Travis County, 53d Judicial Dist. of Texas, 1977).

16. TEX. TAX.-GEN. ANN. art. 1.05 (Vernon 1969).

17. At the time this article was written, the *Computer Language Research* case was set for trial on the merits.

18. TEX. TAX.-GEN. ANN. art. 20.10(G)-(I) (Vernon 1969). See note 11 *supra* and accompanying text.

19. TEX. TAX.-GEN. ANN. art. 12.02(1)(a) (Vernon 1969) provides:

Each corporation liable for payment of a franchise tax shall determine the portion of its entire taxable capital taxable by the State of Texas by multiplying same by an allocation percentage which shall be the percentage relationship which the gross receipts from its business done in Texas bear to the total gross receipts of the corporation from its entire business.

20. 547 S.W.2d 255 (Tex. 1976), *cert. denied*, 46 U.S.L.W. 3436 (Jan. 10, 1978).

21. 4 U.S.C. §§ 105-110 (1970).

income tax as "any tax levied on, with respect to, or measured by, net income, gross income or gross receipts."²² Relying on its analysis of the Buck Act in a prior case,²³ the Texas Supreme Court held that the franchise tax was an income tax and was, therefore, permissible. The court reasoned that the granting of the privilege to transact business in the state was an economic benefit resulting in the realization of gross income to the corporation. The court further reasoned that the franchise tax was a "State tax . . . measured by . . . gross receipts" within the meaning of section 110(c) of the Buck Act.²⁴ It reached this conclusion on the ground that the corporation's taxable capital is allocable to Texas based on the percentage relationship which the corporation's gross receipts from its business done in Texas bear to the corporation's total gross receipts from its entire business.²⁵

Justice Reavley's concurring opinion concluded that the franchise tax was not an income tax within the meaning of the Buck Act.²⁶ Nevertheless, Justice Reavley believed that, for the purpose of taxing General Dynamics for the privilege of doing business throughout the state, the comptroller constitutionally could require the corporation to apportion its corporate capital according to total statewide sales, including sales within the enclave.²⁷ Chief Justice Greenhill dissented on the ground that the franchise tax was a tax on capital, which was not included within the broad definition of income tax in the Buck Act.²⁸ He reasoned that the fact that the franchise tax allocation formula contains a gross receipts factor does not change the tax from a tax on capital into an income tax.

*National Bancshares Corp. v. Bullock*²⁹ raised the question whether dividends and interest received by bank holding companies from national bank subsidiaries constituted gross receipts from business done in Texas pursuant to article 12.02(1)(b).³⁰ Texas has adopted the "location of payor" rule for determining whether income from intangible assets such as stock of a corporation or loans constitute gross receipts from business done in Texas.³¹ Under the location of payor rule only dividends and interest received from corporations incorporated in Texas constitute gross receipts from business done in Texas. Dividends and interest received from corporations incorporated outside Texas are excluded from gross receipts from business done in Texas, even though the corporation may be qualified to do business in

22. *Id.* at § 110.

23. *Humble Oil & Ref. Co. v. Calvert*, 478 S.W.2d 926 (Tex.), *cert. denied*, 409 U.S. 967 (1972).

24. 4 U.S.C. § 110 (1970).

25. 547 S.W.2d at 258-59. The statute supporting this statement is TEX. TAX.-GEN. ANN. art. 12.02(1)(a) (Vernon 1969).

26. 547 S.W.2d at 259.

27. *Id.* Justice Reavley relied on *Werner Mach. Co. v. Director of Taxation*, 350 U.S. 492 (1956), and *Educational Films Corp. v. Ward*, 282 U.S. 379 (1931).

28. 547 S.W.2d at 259. Chief Justice Greenhill read the supreme court's prior decision in *Humble Oil & Ref. Co. v. Calvert*, 478 S.W.2d 926 (Tex.), *cert. denied*, 409 U.S. 967 (1972), as distinguishing between an "income tax" and a tax on capital, such as the franchise tax, for purposes of the Buck Act.

29. Civ. No. 223,714 (Dist. Ct. of Travis County, 53d Judicial Dist. of Texas, March 17, 1976). At the time this article was written, this case was on appeal to the Austin court of civil appeals.

30. TEX. TAX.-GEN. ANN. art. 12.02(1)(b) (Vernon 1969).

31. *Humble Oil & Ref. Co. v. Calvert*, 414 S.W.2d 172, 175 (Tex. 1967).

Texas.³² At one time the comptroller specifically applied the location of payor rule to bank holding companies and excluded dividends and interest paid to them by their national bank subsidiaries within the state.³³

In 1969 the federal statute governing state taxation of national banks³⁴ was amended by Public Law 91-156³⁵ to provide that, for the purpose of any tax law enacted under the authority of any state, a national bank shall be treated as a bank organized and existing under the laws of the state or other jurisdiction within which its principal office is located. The provisions of Public Law 91-156 took effect on January 1, 1973. In 1971 the Texas Legislature enacted House Bill 730,³⁶ which provides that the passage of Public Law 91-156 shall not operate to impose or permit the imposition of any additional tax or taxes upon the "institutions affected thereby" unless (1) the tax or taxes were being imposed prior to January 1, 1971, or (2) such institutions are specifically designated as being subject to such additional tax or taxes other than the limited sales and use tax by an act of the legislature passed subsequent to the effective date of Public Law 91-156.

On April 18, 1974, the comptroller published Ruling 80-0.18,³⁷ which recognizes that dividends and interest paid by national bank subsidiaries to bank holding companies prior to January 1, 1973, are not gross receipts from business done in Texas. The ruling provides, however, that by virtue of Public Law 91-156, dividends and interest paid on or after January 1, 1973, by a national bank whose principal office is located within Texas are includable in gross receipts from business done in Texas pursuant to article 12.02(1)(b).³⁸

In the *National Bancshares* case, the Travis County district court entered a judgment against the taxpayers without opinion, thereby requiring the bank holding companies to include dividends and interest from national bank subsidiaries in their post-January 1, 1973, gross receipts from business done in Texas. In so holding, the court adopted the comptroller's position that even though the franchise taxes of the bank holding companies were increased by the comptroller's application of Public Law 91-156, such bank holding companies nevertheless were not institutions affected thereby within the meaning of House Bill 730.³⁹

32. *Id.*

33. Comptroller's Business Tax Ruling .013(2)(t). The comptroller's rulings may be found in the following looseleaf services: TEX. STATE TAX REP. (CCH); STATE & LOC. TAXES (P-H); [TEXAS] INH. EST. & GIFT TAX REP. (CCH).

34. 12 U.S.C. § 548 (1970).

35. Act of Dec. 24, 1969, Pub. L. No. 91-156, 83 Stat. 434 (codified at 12 U.S.C. § 548 (1976)). 12 U.S.C. § 548 (1976) provides: "For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located."

36. 1971 Tex. Gen. Laws, ch. 292, art. 7, § 1, at 1206 (codified as a footnote in TEX. TAX.-GEN. ANN. art. 20.02 (Vernon Supp. 1978)).

37. On December 31, 1975, Ruling 80-0.18 was reissued as Comptroller's Business Tax Ruling .013(2)(t).

38. TEX. TAX.-GEN. ANN. art. 12.02(1)(b) (Vernon 1969).

39. Another aspect of the allocation formula issue was considered in Comptroller's Administrative Decision No. 8528 (1977), which held that amounts received by a parent corporation from its subsidiaries for legal and professional fees, interest on commercial notes, and insurance expenses paid by the parent on behalf of the subsidiaries constituted gross receipts of the parent for franchise tax purposes. The parent did not charge its subsidiaries for these

In *Bullock v. King Resources Co.*⁴⁰ a corporation engaged in the oil and gas production business utilized the full-cost accounting system for financial reporting, income tax, and franchise tax purposes.⁴¹ In 1970 the corporation sold certain developed oil and gas properties located both in and out of Texas. Based on the full-cost accounting system, these sales produced no "net gain" to be considered under the allocation formula set forth in article 12.02(1)(d) for purposes of determining the corporation's franchise tax.⁴² The comptroller's position was that the net gain referred to in article 12.02(1)(d) must be calculated by using an "expense" accounting system under which all costs allocated to the sales in question, except those directly related to the properties, would be disallowed. The expense accounting method reflected a gain on the sales and resulted in a franchise tax deficiency assessment. Relying on the comptroller's business tax rulings which provide that a company's franchise tax report "shall reflect and the tax shall be computed on the corporation's financial condition as shown in its books and records of account,"⁴³ the court held that the corporation properly computed its franchise tax liability based on the full-cost accounting system.

The United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*⁴⁴ upheld a Mississippi tax on the privilege of engaging or continuing in business or doing business in the state levied on a foreign corporation whose activities were a part of interstate commerce. The corporation transported motor vehicles by motor carrier for General Motors Corporation. The vehicles were assembled outside Mississippi and shipped by rail to Jackson, Mississippi, where they were loaded onto the corporation's trucks and transported by the corporation to various Mississippi car dealers. The corporation based its attack on the Mississippi tax solely on the prior Supreme Court decisions of *Spector Motor Service v. O'Connor*⁴⁵ and *Freeman v. Hewit*.⁴⁶ In these cases the Court held that a tax on the privilege

expenses on a line-for-line basis but estimated the amount and charged each subsidiary a percentage of its annual business. The actual expenses in each case exceeded the amounts charged the subsidiary. The decision relied on Comptroller's Business Tax Rule .013(2)(q), which provides:

Receipts from intercorporate sales and charges for services rendered, between parent and subsidiary, or between other related corporations, constitute gross receipts for franchise tax calculations, as a parent and its subsidiaries, or other affiliated corporations, are separate legal entities. The foregoing applies even though the sales or services are centralized in one of the corporations and reimbursement to it is based on the actual cost expended in behalf of the other corporations.

40. 555 S.W.2d 789 (Tex. Civ. App.—Waco 1977, no writ).

41. Under the full-cost accounting method, non-productive exploration costs and general and administrative expenses are allocated to the discovered reserves, and are deductible in addition to the direct costs attributable to the particular property. *Id.* at 790.

42. TEX. TAX.-GEN. ANN. art. 12.02(1)(d) (Vernon 1969) provides:

For the purpose of this Article, the term 'total gross receipts of the corporation from its entire business' shall include all of the proceeds of all sales of the corporation's tangible personal property, all receipts from services, all rentals, all royalties, and all other business receipts, whether within or outside of Texas. Provided, however, that, as to the sale of investments and capital assets, the term 'total gross receipts of the corporation from its entire business' shall include only the net gain from such sales.

43. Comptroller's Business Tax Ruling .001(2)(a).

44. 430 U.S. 274 (1977).

45. 340 U.S. 602 (1951).

46. 329 U.S. 249 (1946).

of engaging in an activity in a state could not be applied to an activity that was a part of interstate commerce.⁴⁷ In upholding the validity of the Mississippi tax, the Court overruled the *Spector* case and rejected the rule set forth therein that a state tax on the privilege of doing business is *per se* unconstitutional when it is applied to interstate commerce.⁴⁸

A recent administrative decision permitted a corporation to exclude from taxable capital a deferred federal income tax account generated by the capitalization of exploration and development costs for financial accounting purposes and the amortization of such costs on a unit of production basis for federal income tax purposes.⁴⁹ Utilization of such a deferred income tax account for financial accounting purposes accorded with generally accepted accounting principles. In allowing the account's exclusion from taxable capital, the hearings examiner reasoned that the deferred federal income tax account represented timing differences between financial and taxable income which would reverse in a definite amount of time regardless of any actions taken by the taxpayer. The account therefore was indistinguishable from accounts held to be excludable from taxable capital in *Calvert v. Houston Lighting & Power Co.*⁵⁰ This administrative decision expanded the excludability of deferred federal income tax accounts from taxable capital because the comptroller's business tax rulings governing exclusions from taxable capital provide that only deferred federal income tax accounts based on liberalized depreciation or accelerated amortization are excludable from surplus for franchise tax purposes.⁵¹ Another administrative decision held that the deferred portions of federal income tax investment credits taken by the corporation with respect to its acquisitions of public utility property were includable in taxable capital.⁵² Several other administrative decisions considering the includability of items in taxable capital were issued.⁵³

A recent amendment to Comptroller's Business Tax Ruling .015(3)(d)

47. In proceedings before the Mississippi state courts, the corporation did not allege that its activity which Mississippi taxed did not have a sufficient nexus with the state, that the tax discriminated against interstate commerce, that the tax was unfairly apportioned, or that the tax was unrelated to services provided by the state. While the corporation argued before the United States Supreme Court that a tax on "the privilege of doing interstate commerce" creates an unacceptable risk of discrimination and undue burdens, it did not claim that discrimination or undue burdens existed in fact. 430 U.S. at 277-78.

48. 430 U.S. at 288-89.

49. Comptroller's Administrative Decision No. 8070 (1977).

50. 369 S.W.2d 502 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.).

51. Comptroller's Business Tax Ruling .015(2)(a).

52. Comptroller's Administrative Decision No. 7727 (1977).

53. See, e.g., Comptroller's Administrative Decision No. 7248 (1976) (resolution of a corporation's board of directors reducing stated capital is not effective for franchise tax purposes until a statement of such reduction is filed with the secretary of state pursuant to TEX. BUS. CORP. ACT. ANN. art. 4.12(C)-(D) (Vernon 1956)); Comptroller's Administrative Decision No. 7899 (1977) (treasury stock cancelled by resolution of the corporation's board of directors but not cancelled by filing a statement with the secretary of state pursuant to TEX. BUS. CORP. ACT. ANN. art. 4.11(B)-(D) (Vernon 1956), is includable in the corporation's taxable capital); Comptroller's Administrative Decision No. 8327 (1977) (corporate purchase of accounts receivable from dealers at 90% of the receivable's face value and retention of 5% of the purchase price in a reserve account is in the nature of a reserve for bad debts excludable from taxable capital); Comptroller's Administrative Decision No. 8225 (1977) (taxpayer may not exclude from surplus a reserve for industrial compensation claims derived by use of actuarial tables, prevailing state tax tables, and claims in process since the reserves are not actual liabilities and are not fixed in amount).

concerns the method of accounting for a corporation's investment in subsidiaries.⁵⁴ The ruling now requires all parent or investor corporations to use the cost method of accounting in calculating and reporting the franchise tax on its investment in subsidiaries or investees. Previously the ruling provided that whatever method (cost or equity) a parent or investor corporation used to record its investment on its books and records of account had to be followed for franchise tax purposes.⁵⁵ The amendment is applicable to any franchise tax report required to be filed after December 13, 1977.

A recent legislative change in the franchise tax statutes clarified the exemption available for corporations engaged in a business involving solar energy devices.⁵⁶ Administrative matters amended included forfeiture of the right to do business in the state upon failure to file franchise tax reports or pay franchise taxes or penalties,⁵⁷ liability of officers and directors for such a forfeiture,⁵⁸ notice required to be given before the forfeiture is effective,⁵⁹ and franchise tax report content requirements.⁶⁰

III. SALES AND USE TAXES

In *Bullock v. Statistical Tabulating Corp.*⁶¹ the supreme court held that the keypunching of computer cards constituted a service and was not a sale of tangible personal property at retail to which a sales tax would apply. The taxpayer, a data processing concern, translated data supplied by the customer onto keypunch cards and instructed the customer how to program his

54. Comptroller's Business Tax Ruling .015(3)(d). Several suits had been filed contesting the validity of the ruling as it existed prior to its amendment in 1977. See Burke, *Taxation, Annual Survey of Texas Law*, 31 Sw. L.J. 435, 441 n.45 (1977), and cases cited therein.

55. The previous ruling was embodied in Comptroller's Business Tax Ruling 80-0.09.

56. TEX. TAX.-GEN. ANN. art. 12.03(1)(r) (Vernon Supp. 1978) was amended to clarify that the franchise tax exemption applies to corporations engaged in the business of manufacturing, selling, or installing solar energy devices.

57. TEX. TAX.-GEN. ANN. art. 12.14(2) (Vernon Supp. 1978) now provides that a corporation automatically shall forfeit its right to do business in Texas if its franchise tax report is not filed or if the amount of its franchise tax and penalties are not paid in full on or before September 15 of each year; or, when an initial tax report or payment is required, on or before ninety days after the time the initial report and payment is required. In such situations, the forfeiture is consummated by the comptroller without judicial ascertainment.

58. TEX. TAX.-GEN. ANN. art. 12.14(3) (Vernon Supp. 1978) was amended to change the standard by which officers and directors of a corporation which has forfeited its right to do business within the State of Texas are to be held liable for franchise taxes and other debts of such corporation which become due and payable subsequent to the date of forfeiture. Pursuant to the amended statute, an officer or director is liable for such items unless he can show that the debt was created (1) over his objection, or (2) without his knowledge, if the exercise of reasonable diligence to acquaint himself with the affairs of the corporation would not have revealed the intention to create the debt.

59. TEX. TAX.-GEN. ANN. art. 12.15 (Vernon Supp. 1978) was amended to provide that the comptroller shall notify each corporation failing timely to file its franchise tax report or pay its franchise taxes that its right to do business in the state will be forfeited without judicial ascertainment unless the overdue franchise tax reports are filed or the overdue franchise taxes together with penalties are paid. The notice must be mailed during the 45-day period following the day on which the report or payment was required to be made.

60. TEX. TAX.-GEN. ANN. art. 12.12 (Vernon Supp. 1978) was amended to provide that each corporation must provide on its franchise tax report (1) the name, title and mailing address of each director and officer of the corporation; and (2) the name of each corporation in which the corporation filing the report owns a ten percent or greater interest, the percentage owned by the corporation, and the name of each corporation which owns a ten percent or greater interest of the corporation filing the report. The comptroller is to forward this information to the secretary of state to be available for public inspection.

61. 549 S.W.2d 166 (Tex. 1977).

computer to read and store the data on the cards, which then became useless. The taxpayer supplied the cards used in the transaction and paid a sales tax when it bought the cards from its supplier. Customers were billed either on an hourly labor rate or on a flat rate per one thousand cards. Customers were not charged for the cards but for the transfer of the data onto the cards.

The issue before the court involved a construction of the general definition of sale contained in article 20.01(K)(1)(a)⁶² and of the special definition of sale in article 20.01(K)(2)(a).⁶³ In holding that the transaction constituted a nontaxable service, the supreme court determined that the true object of the transaction was not the data processing card as contended by the comptroller, but the purchase of coded or processed data, an intangible item. Rejecting the comptroller's contention that the transaction was a taxable sale pursuant to the special definition of sale found in article 20.01(K)(2)(a),⁶⁴ the court stated:

[T]he transaction at issue here is not one which the legislature intended to be taxed under this section. This section was intended to prevent taxpayers from avoiding sales taxes by structuring a transaction such that it appears that there was no transfer of title or possession of tangible personal property. It prevents discrimination between the customer who can afford to purchase custom-made articles and that customer who 'buys off the rack.' This is not the case here.⁶⁵

The court's holding is in accord with prior Texas cases which disapproved the taxation of service-related activities.⁶⁶

*Bullock v. Lone Star Gas Co.*⁶⁷ concerned the applicability of the article 20.04(G)(3)(a)⁶⁸ exemption to materials incorporated into pipelines. The article exempts from the use tax the use within Texas of tangible personal property acquired outside the state and moved into the state for use as a "licensed and certificated carrier of persons or property."⁶⁹ The 1972 district court decision in *Explorer Pipeline Co. v. Calvert*⁷⁰ held the article

62. TEX. TAX.-GEN. ANN. art. 20.01(K)(1)(a) (Vernon 1969) provides that: "'Sale' means and includes any transfer of title or possession, or segregation in contemplation of transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration."

63. TEX. TAX.-GEN. ANN. art. 20.01(K)(2)(a) (Vernon 1969) defines sale as: "[t]he producing, fabrication, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish, either directly or indirectly, the materials used in the producing, fabricating, processing, printing, or imprinting."

64. *Id.*

65. 549 S.W.2d at 169.

66. In *Williams & Lee Scouting Serv., Inc. v. Calvert*, 452 S.W.2d 789 (Tex. Civ. App.—Austin 1970, writ ref'd), the court held an oil field scouting company's gathering of statistical data and other information and furnishing of reports to various oil companies constituted the performance of a nontaxable service. In *Calvert v. Julian Gold, Inc.*, 479 S.W.2d 328 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.), charges for altering women's clothing were held to be charges for remodeling and thereby excluded from the definitions of "receipts" and "sales price" set forth at TEX. TAX.-GEN. ANN. art. 20.01(D)(2)(g) (Vernon 1969) and TEX. TAX.-GEN. ANN. art. 20.01(L)(3)(g) (Vernon Supp. 1978).

67. 558 S.W.2d 566 (Tex. Civ. App.—Waco 1977, writ filed).

68. TEX. TAX.-GEN. ANN. art. 20.04(G)(3)(a) (Vernon 1969).

69. *Id.*

70. Civ. No. 193,423 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas, Nov. 16, 1972).

exempted pipe and other component parts purchased outside the state and brought into the state for use in pipeline construction. The comptroller did not appeal the decision and granted use tax refunds to other pipeline carriers in similar fact situations.⁷¹ The comptroller subsequently changed his policy by issuing a sales tax ruling which provided that items of tangible personal property which are to be assembled into carriers are not exempt pursuant to article 20.04(G)(3)(a) because such items are not licensed and certificated carriers when they enter the state.⁷²

In *Bullock v. Lone Star Gas Co.*⁷³ the taxpayer, holding a permit from the Texas Railroad Commission, engaged in the business of gathering, transporting, and selling natural gas. During 1972 the taxpayer decided to construct an intrastate pipeline in Texas. Portions of the pipe incorporated into the pipeline were purchased by the taxpayer from the Crispin Corporation of Houston, Texas, whose major business activity was brokering foreign steel products. Pursuant to the contract between the taxpayer and Crispin, Crispin arranged for the pipe to be manufactured to Lone Star's specifications by mills in France and Italy. Crispin purchased the pipe from these foreign mills and sold it to Lone Star. The taxpayer employed an independent inspection firm to inspect and reject pipe during production, manufacture, and shipment of the pipe to Texas. Crispin was responsible for transportation of the pipe from Europe to the final transportation point near Houston, Texas. Under the contract, however, title to the pipe passed to Lone Star upon railroad loading at the European mills. After the pipe arrived at the port of Houston, it was first taken to a storage yard and then to the yard of a firm which coated the pipe for corrosion protection. Thereafter, the pipe was loaded on the taxpayer's trucks and shipped to west Texas.

In holding that the pipe was exempt from the use tax pursuant to article 20.04(G)(3)(a), the court rejected three arguments advanced by the comptroller. First, the court held that the pipe was not subject to the sales tax upon which the use tax exemption would not operate. The court pointed out that the contract between the taxpayer and Crispin specifically provided that title to the pipe passed from Crispin as seller to the taxpayer as buyer at the steel mills in Europe. The court noted that the definition of the term sale as set forth in article 20.01(K)(1)(a)⁷⁴ refers to a transfer of title or possession,

71. Defendant's Answers and Responses to Plaintiff's Request for Admissions and Written Interrogatories, Admission No. 19, *Bullock v. Lone Star Gas Co.*, 558 S.W.2d 566 (Tex. Civ. App.—Waco 1977, writ filed).

72. See Comptroller's Sales Tax Ruling .017(1), which provides:

Carrier devices such as ships and aircraft, which are acquired outside this state and are moved into this state for use as a licensed and certificated carrier of persons or property, are exempt from the *use tax*. Such carriers are entitled to this exemption only if acquired outside Texas. Repair or replacement parts which are acquired outside this state and actually affixed in this state to a self-propelled vehicle which is a licensed and certificated carrier of persons or property are exempt from the *use tax*. Trailers, barges, and semitrailers are not considered to be self-propelled vehicles. Taxable items which are to be assembled into carriers are not exempt under the provisions of Article 20.04(G)(3)(a) as such items are not licensed and certificated carriers when they enter the state.

73. 558 S.W.2d 566 (Tex. Civ. App.—Waco 1977, writ filed).

74. TEX. TAX.-GEN. ANN. art. 20.01(K)(1)(a) (Vernon 1969). See note 62 *supra*.

or a segregation in contemplation of a transfer of title or possession. The court concluded that the pipe was "segregated" at the mills where it was specially manufactured and stenciled to identify it for the taxpayer.⁷⁵ Second, the court relied on a prior Texas Supreme Court decision holding that the term permit is synonymous with the term license⁷⁶ to reject the comptroller's contention that the taxpayer's permit from the railroad commission did not qualify it as a "licensed and certificated carrier."⁷⁷ Third, the court rejected the comptroller's argument that even if the taxpayer was a licensed and certificated carrier, the pipe was subject to the use tax because it was stored in Texas after it arrived and before it was used as part of the pipeline. The court reasoned that since the pipe at all times was intended for use as a gas pipeline, subjecting the pipe to the use tax during the storage phase would render the exemption meaningless and would be a misconstruction of the exemption statute.⁷⁸

The decision in *Lone Star Gas*, if upheld, may resolve a problem in the application of local sales and use taxes to drop-shipment transactions. The problem arises when a customer places an order at a retailer's place of business in a Texas city which has adopted the Local Sales and Use Tax Act⁷⁹ for goods shipped directly to the customer from an out-of-state facility of a manufacturer unrelated to the retailer. The comptroller's present position is that this transaction gives rise to a sale for local sales and use tax purposes which is deemed to be consummated where the order was placed.⁸⁰

This position was weakened substantially by *Lone Star Gas*. According to the court, when a customer orders goods through a Texas vendor that are shipped directly to the customer by an out-of-state manufacturer unrelated to the Texas vendor, the point of the sale for Texas sales and use tax purposes is the out-of-state manufacturer's mill at which the goods are segregated in contemplation of transfer of possession to the customer. Since the sale occurs outside of Texas, the tax to be imposed in connection with the transaction is a use tax as opposed to a sales tax. When a transaction is subject to the local use tax as opposed to the local sales tax, the applicability of the local use tax depends upon the point at which the purchaser stores, uses or consumes the goods.⁸¹ The point at which the order is taken, therefore, has no bearing on a determination as to whether local tax is owing.

75. The court relied in part on prior supreme court holdings that a segregation in contemplation of transfer of title or possession occurs and a sale takes place for purposes of the Limited Sales, Excise and Use Tax Act when materials are loaded upon a common carrier or other means of transportation for shipment to the vendee. *Day & Zimmerman, Inc. v. Calvert*, 519 S.W.2d 106, 110 (Tex. 1975); *Gifford-Hill & Co. v. State*, 442 S.W.2d 320, 323 (Tex. 1969). The court found the rule enunciated in these cases foreclosed the comptroller's argument that the pipe was subject to the sales tax on the theory that there was a transfer of possession of the pipe from Crispin to the taxpayer at Houston, Texas. Furthermore, the court noted that while the pipe was being transported from the European mills to Texas, Crispin was acting as bailee, holding the pipe for the taxpayer, which was the bailor and owner. 558 S.W.2d at 570.

76. *Motl v. Boyd*, 116 Tex. 82, 286 S.W.458 (1926).

77. 558 S.W.2d at 571.

78. *Id.*

79. TEX. REV. CIV. STAT. ANN. art. 1066c (Vernon Supp. 1978).

80. Comptroller's Local Tax Ruling .004(2).

81. Comptroller's Local Tax Ruling .005(1).

In *American Biomedical Corp. v. Bullock*⁸² the court upheld the imposition of sales and use taxes on the purchase of drugs and chemicals by a medical laboratory to be used in performing tests on human body fluids and tissues at the request of licensed physicians. The court held that the purchase of such materials was not within the scope of article 20.04(M),⁸³ which exempts from sales and use taxes drugs and medicines prescribed or dispensed for humans or animals by a licensed practitioner of the healing arts.

The applicability of sales and use taxes to the leasing and licensing of motion picture films to motion picture theaters in Texas from October 4, 1975, to June 10, 1977, was upheld in *Bullock v. ABC Interstate Theatres, Inc.*⁸⁴ Article 20.04(Z),⁸⁵ before its amendment on June 10, 1977,⁸⁶ exempted from sales and use taxes "the receipts from the leasing or licensing of motion picture films of any kind to or by motion picture theaters which were subject to admissions taxes."⁸⁷ On October 4, 1975, a district court in Travis County held unconstitutional the admissions tax imposed on motion picture theaters pursuant to article 21.02(2).⁸⁸ Thereafter, the comptroller issued a retroactive ruling which provided that, because motion picture theaters were no longer subject to admissions taxes, the sales and use tax applied to the rental, lease, and licensing of motion picture films of any kind to or by theaters.⁸⁹

The motion picture theaters brought suit, contending that the sales and use tax was discriminatory and therefore unconstitutional because the tax on film rentals was imposed on motion picture theaters and not on licensed television stations. Subsequent to the commencement of the litigation, and after the cases were submitted and orally argued before the Austin court of civil appeals, the legislature amended Article 20.04(Z) to accord unqualified exemption from sales and use taxes to both motion picture theaters and licensed television stations, effective June 10, 1977.⁹⁰ Relying on a prior decision in which it held that there were significant differences between television stations and motion picture theaters which provided a reasonable basis for classification of the two industries in separate categories for tax purposes,⁹¹ the court held that the application of sales and use taxes to receipts from leasing and licensing motion picture films to motion picture theaters in Texas between October 4, 1975, and June 10, 1977, was constitutional.⁹² The theaters further contended that since the bill amending article

82. 551 S.W.2d 177 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

83. TEX. TAX.-GEN. ANN. art. 20.04(M) (Vernon Supp. 1978).

84. 557 S.W.2d 337 (Tex. Civ. App.—Austin 1977, writ filed).

85. TEX. TAX.-GEN. ANN. art. 20.04(Z) (Vernon Supp. 1978).

86. TEX. TAX.-GEN. ANN. art. 20.04(Z) (Vernon Supp. 1978) was amended, effective June 10, 1977, to provide: "There are exempted from the taxes imposed by this Chapter the receipts from the leasing or licensing of motion picture films of any kind to or by motion picture theaters and to or by licensed television stations."

87. TEX. TAX.-GEN. ANN. art. 20.04(Z) (Vernon Supp. 1978).

88. TEX. TAX.-GEN. ANN. art. 20.01(2) (Vernon Supp. 1978). See *Bullock v. Interstate Theatres, Inc.*, 557 S.W.2d 337, 340 (Tex. Civ. App.—Austin 1977, writ filed).

89. 557 S.W.2d at 340.

90. The amended statute is quoted at note 86 *supra*.

91. *Calvert v. American Int'l Television, Inc.*, 491 S.W.2d 455 (Tex. Civ. App.—Austin 1973, no writ).

92. 557 S.W.2d at 341.

20.04(Z) passed both houses of the legislature by an overwhelming majority, a sales and use tax on film rentals never was intended by the legislature. Noting that evidence of such a lack of legislative intent did not appear in the bill, the court rejected this argument.⁹³

An opinion of the Texas attorney general⁹⁴ concluded that the exemption contained in article 20.04(N)(6)⁹⁵ relating to certain machinery or equipment exclusively used or employed on farms and ranches in the processing, packing, or marketing of agricultural products by the original producer did not extend to machinery and equipment utilized by an agricultural cooperative association to process, pack, or market its members' products. The attorney general reasoned that such machinery and equipment was neither "operated by the original producer" nor used "exclusively for . . . his own products" and thus was not within the scope of the exemption.⁹⁶ A series of amendments to the comptroller's sales tax rulings pertaining to agriculture⁹⁷ have resulted from this opinion.

In *Lorenzo Textile Mills, Inc. v. Bullock*⁹⁸ the issue before the district court was the appropriate statute of limitations available to the comptroller for issuing a notice of deficiency determination in a sales and use tax assessment. The taxpayer contended that the applicable statute of limitations was article 20.06(D)(1),⁹⁹ which provides that "every notice of a deficiency determination shall be personally served or mailed within four years after the last day of the calendar month following the quarterly period for which the amount is proposed to be determined or within four years after the return is filed, whichever period expires the later."¹⁰⁰ The comptroller contended that the four-year statute of limitations can be extended pursuant to article 1.045(A)(3),¹⁰¹ which provides for extension "in the case of gross

93. *Id.* at 340.

94. TEX. ATT'Y GEN. OP. NO. H-932 (1977).

95. TEX. TAX.-GEN. ANN. art. 20.04(N)(6) (Vernon Supp. 1978) exempts from sales and use taxes the following:

Machinery or equipment exclusively used or employed on farms or ranches in the production of food for human consumption, production of grass, the building or maintaining of roads and water facilities, feed for any form of animal life, or other agricultural products to be sold in the regular course of business, and machinery, equipment, and gooseneck trailers exclusively used in the processing, packing, or marketing of agricultural products by the original producer at a location operated by the original producer exclusively for processing, packing, or marketing his own products.

96. TEX. ATT'Y GEN. OP. NO. H-932, at 3896 (1977).

97. Subsequent to the issuance of TEX. ATT'Y GEN. OP. NO. H-932 (1977), the comptroller issued emergency amendments to Comptroller's Sales Tax Ruling .016 which excluded from the definition of "farm and ranch" agricultural cooperatives as organized pursuant to TEX. REV. CIV. STAT. ANN. arts. 5737-5764 (Vernon Supp. 1978). See 2 Tex. Reg. 690 (1977). The comptroller subsequently determined that while machinery and equipment utilized by an agricultural cooperative to process, pack or market its member's products is not within the scope of the exemption set forth in article 20.04(N)(6), machinery and equipment purchased by agricultural cooperatives and exclusively used on farms or ranches in the production of food for human consumption would be within the scope of the exemption. To reflect this determination, the comptroller issued an additional emergency amendment to Comptroller's Sales Tax Ruling .016. See 3 Tex. Reg. 78 (1978).

98. Civ. No. 248,945 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas, June 28, 1977). The case is being appealed to the Austin court of civil appeals.

99. TEX. TAX.-GEN. ANN. art. 20.06(D)(1) (Vernon 1969).

100. *Id.*

101. TEX. TAX.-GEN. ANN. art. 1.045(A)(3) (Vernon 1969).

error in information reported in a return that would increase the amount of tax payable by twenty-five percent or more."¹⁰² The taxpayer countered that the provisions of article 1.045(A) did not affect the four-year limitations period imposed by article 20.06(D)(1), asserting that the unextended four-year limitations period was confirmed by the enactment of article 1.045(B),¹⁰³ wherein a four-year statute of limitations is provided for sales and use taxes. Contrary to the taxpayer's view, the district court held that the applicable limitations period can be extended beyond the four-year period set forth in article 20.06(D)(1) when there is a gross error in information reported by a taxpayer in a return that would increase the amount of sales and use tax payable by twenty-five percent or more.

* The United States Supreme Court in *National Geographic Society v. California Board of Equalization*¹⁰⁴ considered what nexus with the taxing state would be required to subject an out-of-state seller to use tax collection liability. The Society maintained two offices in California that solicited advertising for the Society's magazine but performed no activities relating to the Society's mail order business conducted from the District of Columbia headquarters. All orders for the Society's sales items were mailed from California directly to the Society's headquarters. The question was whether the Society's activities at the California offices provided a sufficient nexus between the Society and the state, as required by the due process clause of the fourteenth amendment and the commerce clause, to support the imposition of a state use tax collection liability upon the Society. The Supreme Court held that even though the two offices played no part in the Society's sales activities in the state, the Society's continued presence in California in offices that solicited advertising for its magazine provided a sufficient nexus to justify California's imposition upon the Society of the duty to act as collector of use taxes.¹⁰⁵ The Court noted, however, that its affirmance of the California Supreme Court does not imply agreement with that court's "slightest presence" standard of constitutional nexus.¹⁰⁶

Numerous administrative decisions regarding sales and use taxes were issued by the comptroller during the survey period. These decisions involved sales for resale,¹⁰⁷ contractors and repairmen,¹⁰⁸ the exemption for

102. *Id.*

103. TEX. TAX.-GEN. ANN. art. 1.045(B) (Vernon 1969).

104. 430 U.S. 551 (1977).

105. *Id.* at 562.

106. *Id.* at 556.

107. Comptroller's Administrative Decision No. 7964 (1977) (lending without charge of property which was purchased under a resale certificate subjects the purchaser to tax on the purchase price); Comptroller's Administrative Decision No. 8041 (1977) (a donation to a charitable organization of property purchased for resale constitutes a taxable use of the property and subjects the purchaser to sales and use tax based on the purchase price); Comptroller's Administrative Decision No. 7808 (1977) (a "tax number" on an invoice does not constitute a valid resale certificate; in the absence of either a resale certificate or other proof that the sale was for resale, the sale is subject to sales and use tax); Comptroller's Administrative Decision No. 7886 (1977) (a retailer will be considered to have accepted a resale certificate in good faith unless the comptroller can show that the retailer had actual knowledge that the tangible personal property was not purchased for resale); Comptroller's Administrative Decision No. 8639 (1977) (when the taxpayer purchased pinball vending machines which were placed at various locations under contract whereby the taxpayer received one-half of the

materials used in manufacturing,¹⁰⁹ the exemption for gas and electricity,¹¹⁰ the occasional sale exemption,¹¹¹ and various other matters.¹¹²

machines' revenues, such machines were used for purposes other than demonstration, retention, or display while being held for resale and were taxable).

108. Comptroller's Administrative Decision No. 7017 (1977) (a lump-sum contractor cannot be given a credit for sales and use taxes paid to his vendor on items which were purchased for use on lump-sum contracts and were lost or stolen prior to their use); Comptroller's Administrative Decision No. 7979 (1977) (a person who builds cabinets, delivers them to his customers at a job site and puts them in place, but neither affixes them to the realty nor has responsibility for such affixation, is a seller of tangible personal property rather than a "contractor"); Comptroller's Administrative Decision No. 7563(1) (1977) (stress relieving of pipe is a repair for sales and use tax purposes); Comptroller's Administrative Decision No. 7380 (1977) (the replacement of an automobile windshield for a consideration is a sale and installation of tangible personal property and not a repair for sales and use tax purposes).

109. Comptroller's Administrative Decision No. 7368 (1976) (lubricants used to maintain manufacturing machinery and equipment and work gloves used during the manufacturing process to handle rough materials are supplies used in a manner that is merely incidental to the manufacturing operation and thus are taxable); Comptroller's Administrative Decision No. 7563(2) (1977) (quality control charts which are used and discarded on a daily basis are exempt from tax pursuant to TEX. TAX.-GEN. ANN. art. 20.04(E)(1)(b) (Vernon 1969)); Comptroller's Administrative Decision No. 8588 (1977) (hand files used to remove burrs and level the ends of manufactured products are taxable as hand tools pursuant to TEX. TAX.-GEN. ANN. art. 20.04(E)(1)(b)(iii) (Vernon 1969)); Comptroller's Administrative Decision No. 7574 (1977) (materials used in quality control tests are exempt pursuant to TEX. TAX.-GEN. ANN. art. 20.04(E) (Vernon 1969)); Comptroller's Administrative Decision No. 8118 (1977) (the propagation and sale of genetically uniform, disease-free rodents for use in medical research is not a "manufacturing, processing, or fabricating operation" within the meaning of TEX. TAX.-GEN. ANN. art. 20.04(E) (Vernon 1969)).

110. Comptroller's Administrative Decision No. 7378 (1976) (electricity used to cool and freeze food products to a desired temperature constitutes processing and is exempt from sales and use tax pursuant to TEX. TAX.-GEN. ANN. art. 20.04(R) (Vernon 1969), while electricity used to maintain food products at a desired temperature after cooling or freezing constitutes a "commercial use" for sales and use tax purposes and thus is taxable pursuant to article 20.04(R)); Comptroller's Administrative Decision No. 7558 (1977) (purchases of gas and electricity by a company engaged in the business of transporting materials extracted from the earth are taxable when used to operate guardhouses and warehouses which are not used directly in the transportation process); Comptroller's Administrative Decision No. 8134 (1977) (the taxpayer's purchases of gas and electricity used in the production of chilled water, heated water, and steam which were piped to customers constituted the processing of tangible personal property and were exempt pursuant to TEX. TAX.-GEN. ANN. art. 20.04(R) (Vernon 1969)).

111. Comptroller's Administrative Decision No. 7303 (1976) (a retailer regularly engaged in the business of selling taxable items at retail cannot claim the occasional sale exemption set forth in TEX. TAX.-GEN. ANN. art. 20.01(F)(1) (Vernon 1969) for sales of obsolete items even though less than three such sales were made from each of the retailer's locations); Comptroller's Administrative Decision No. 7746 (1977) (the sale of all a company's assets except for its small inventory of poor quality finished products constitutes a sale of its entire operating assets under TEX. TAX.-GEN. ANN. art. 20.01(F)(2) (Vernon 1969)); Comptroller's Administrative Decision No. 8716 (1977) (since the taxpayer was engaged in selling auto parts and had a sales tax permit, he could not qualify for the occasional sale exemption with respect to the sale of a tractor).

112. Comptroller's Administrative Decision No. 7113 (1976) (a Texas purchaser is responsible for the payment of use tax upon its purchase of a computer from the State of Connecticut on the ground that states are included within the definition of "person" contained in TEX. TAX.-GEN. ANN. art. 20.01(A) (Vernon 1969) and, therefore, are retailers for sales and use tax purposes); Comptroller's Administrative Decision No. 7901 (1976) (tangible personal property which is purchased outside of Texas for assembly in Texas into a licensed and certificated carrier of persons or property is not exempt pursuant to TEX. TAX.-GEN. ANN. art. 20.04(G)(3)(a) (Vernon 1969) on the ground that such property is not a carrier when it enters the state); Comptroller's Administrative Decision No. 7417 (1976) (a taxpayer is liable for sales and use taxes on its purchase of gas cylinders which are filled with gas and leased to customers in connection with the sale of the gas on the ground that the taxpayer makes a taxable use of the cylinders when it fills them with the gas); Comptroller's Administrative Decision No. 7664 (1977) (the wiring of a printing press to the main electrical terminal in the taxpayer's plant represents the performance of a service and does not constitute the sale of tangible personal property); Comptroller's Administrative Decision No. 7401 (1977) (a purchaser does not have to purchase a going concern in order to acquire a "business" for purposes of the successor liability provisions set forth in TEX. TAX.-GEN. ANN. art. 20.09(I) (Vernon 1969)); Comptroller's

Most of the legislative activity in the sales and use tax area concerned exemption statutes.¹¹³ Metropolitan rapid transit authorities were given the power to impose a one percent sales and use tax,¹¹⁴ and the comptroller has promulgated emergency rules concerning the administration of this tax.¹¹⁵ In addition, the legislature made several minor amendments to the sales and use tax statutes.¹¹⁶

Administrative Decision No. 7847 (1977) (a landowner must collect and remit sales and use tax on the sales price of caliche which is severed and removed by a contractor from the landowner's property); Comptroller's Administrative Decision No. 7449 (1977) (the taxpayer, which sold canned drinks through a vending machine and received a subsidy for each drink sold from the person on whose premises the machine was located, owed sales and use taxes on the subsidy as part of its receipts from the sale of the drinks); Comptroller's Administrative Decision No. 6843 (1977) (a transfer of tangible personal property between two commonly-owned corporations is subject to sales and use taxes on the ground that the corporations constitute separate legal entities and thus there is a change in ownership of the transferred tangible personal property); Comptroller's Administrative Decision No. 8206 (1977) (sales of meals by a hospital cafeteria to hospital employees and visitors are subject to sales and use taxes); Comptroller's Administrative Decision No. 7995 (1977) (sales of cement are exempt from sales and use taxes pursuant to TEX. TAX.-GEN. ANN. art. 20.04(D)(1)(g) (Vernon 1969); Comptroller's Administrative Decision No. 8167 (1977) (the making of photocopies for a consideration constitutes the sale of tangible personal property rather than a service and thus is subject to sales and use taxes); Comptroller's Administrative Decision No. 8443 (1977) (hand controls installed on automobiles to correct a human defect constitute an orthopedic appliance pursuant to TEX. TAX.-GEN. ANN. art. 20.04(M) (Vernon Supp. 1978) and thus are exempt from sales and use taxes); Comptroller's Administrative Decision No. 8209 (1977) (a retailer's receipts for sales and use tax purposes do not include amounts represented by coupons or certificates accepted by the retailer as part of its sales price, where the retailer receives no reimbursement for the amount of the coupons or certificates); Comptroller's Administrative Decision No. 8040 (1977) (when the purchase price of tangible personal property is in litigation, the amount that appears on the face of the contract will constitute the tax base for sales and use tax purposes until such amount is redetermined judicially); Comptroller's Administrative Decision No. 8668 (1977) (TEX. TAX.-GEN. ANN. art. 20.04(G)(3)(a) (Vernon 1969) only confers an exemption upon actual carrier devices which meet the requirements of the exemption statute and does not confer an exemption upon non-carrier devices used by a licensed and certificated carrier in its business); Comptroller's Administrative Decision No. 8407 (1977) (the licensing of a barge by the United States Coast Guard for safety and inspection purposes does not make the barge a licensed and certificated carrier of persons or property pursuant to TEX. TAX.-GEN. ANN. art. 20.04(G)(3)(a) (Vernon 1969)).

113. TEX. TAX.-GEN. ANN. art. 20.04(H)(7) (Vernon Supp. 1978) (exempting organizations qualifying for exemption from federal income tax pursuant to section 501(c)(3) of the Internal Revenue Code, provided that no item purchased shall be used for the personal benefit of any private stockholder or individual and the items purchased must be related to the purposes of the organization); *id.* art. 20.04(M) (exempting receipts related to syringes and hypodermic needles used for medical purposes); *id.* art. 20.04(Z) (deleting the requirement that a motion picture theater must be subject to admissions taxes in order to be exempt from sales and use taxes with respect to the leasing or licensing of motion picture films); *id.* art. 20.04(AA) (exempting the purchase of emergency medical equipment when purchased by a volunteer fire department); *id.* art. 20.04(BB)(4) (exempting newspapers, whether or not sold or distributed by individual copy or subscription); *id.* art. 20.04(FF) (exempting magazines when sold on a subscription basis for a semiannual or longer period of time and distributed by second class mail); *id.* art. 20.04(FF) (exempting receipts from the sale, lease, rental or use of films, tapes, photographs, transparencies, and graphic art materials to or by a licensed radio or television station subject to regulatory jurisdiction of the Federal Communications Commission if used or consumed in or during any phase of broadcasting operation and program services; the exemption does not include machinery, equipment, replacement parts, and accessories for the machinery, or equipment having a useful life when new in excess of six months); *id.* art. 20.04(GG) (exempting receipts from the sale and the use, storage, and other consumption of taxable items sold or acquired at a tax-free sale or auction held by religious, educational, charitable, or eleemosynary organizations exempted pursuant to *id.* art. 20.04(H)(5); such organizations may hold only one tax-free sale or auction during each calendar year which may continue for one day only).

114. TEX. REV. CIV. STAT. ANN. art. 1118x, § 11B (Vernon Supp. 1978).

115. See Comptroller's Metropolitan Transit Authority Rulings .001 *et seq.*, 2 Tex. Reg. 4812 (1977).

116. TEX. TAX.-GEN. ANN. art. 20.01(L)(3)(i) (Vernon Supp. 1978) (excluding from the definition of "sales price" voluntary gratuities and reasonable mandatory charges for the

IV. INHERITANCE TAXES

*Bullock v. City National Bank*¹¹⁷ concerned the taxability of a non-insured wife's ownership interest in an insurance policy on her husband's life where upon their simultaneous death the life insurance proceeds were paid in to a trust. In 1971 the husband and wife created trusts funded by insurance policies on the husband's life. Subsequently, the husband, wife, and their children died in an airplane crash. The comptroller assessed additional inheritance taxes against the estate of the wife on the grounds that one-half of the proceeds of the insurance policies on the life of the husband, which were payable to the trust, should be included in the wife's estate for inheritance tax purposes.

Relying on federal court decisions which had considered the issue for federal estate tax purposes,¹¹⁸ the court held that the value of the wife's ownership interest in the community life insurance policies for inheritance tax purposes was not one-half of the proceeds of the policies, but one-half of the interpolated terminal reserve value of the policies, which was stipulated by the parties to be zero. The state contended that application of the Texas Simultaneous Death Statute¹¹⁹ placed one-half of the proceeds of the policies in the wife's ownership, thereby rendering her estate subject to additional inheritance taxes. In rejecting this contention the court noted that the provisions of the statute applied only to proceeds of life insurance policies which are community property and become payable to the estate of either the husband or the wife. In this case the statute was inapplicable because the proceeds were paid to the trust named in the policies rather than to the estate of either spouse. Furthermore, the court noted that the Texas Simultaneous Death Statute was, by its express terms, inapplicable to cases in which provision had been made for living trusts or contracts of insurance

service of meals and food products, including soft drinks and candy, for immediate human consumption when the service charge is separated from the sales price of the meal or food product and identified as a gratuity or tip and when the total amount of the service charge is disbursed by the employer to employees who customarily and regularly provide such service); *id.* art. 20.01(Y)(1) (amending the definition of "newspaper" to mean a publication printed on newsprint whose average sales price per copy over a thirty-day period does not exceed seventy-five cents and which is printed and distributed periodically at daily, weekly, or other short intervals for the dissemination of news of a general character and of a general interest); *id.* art. 20.021(F) (providing that purchases of liquor, wine, beer, or malt liquor by the holder of a retail license or permit issued under the provisions of the Texas Liquor Control Act from holders of certain specified manufacturer's, wholesaler's, and distributor's permits shall be presumed to be a purchase for resale, and no resale certificates covering such sales shall be required); *id.* art. 20.021(L)(1) (providing that a retailer is not required to remit sales and use taxes on the portion of a payment for a sale remaining unpaid if the retailer enters the unpaid portion in his books as a bad debt and if either during the reporting period or during a subsequent reporting period the bad debt is claimed as a deduction for federal tax purposes; if payment subsequently is made, the retailer must report and pay the tax during the reporting period in which the payment is made); *id.* art. 20.021(L)(2) (providing that a credit shall be allowed or reimbursement made to the retailer for taxes paid on sales subsequently determined to be a bad debt and charged off as such for federal income tax purposes or on the portion of the purchase price remaining unpaid at the time of repossession made under the terms of a conditional sales contract).

117. 550 S.W.2d 763 (Tex. Civ. App.—Austin 1977, no writ).

118. *Wien v. Commissioner*, 441 F.2d 32 (5th Cir. 1971); *Chown v. Commissioner*, 428 F.2d 1395 (9th Cir. 1970).

119. TEX. PROB. CODE ANN. § 47(b) (Vernon Supp. 1978).

for disposition of property different from the provisions of the statute.¹²⁰

During the survey period, the comptroller substantially revised and reissued all Inheritance Tax Rulings.¹²¹ Legislation enacted during the survey period exempts from inheritance taxes the value of certain annuities or other payments received by any beneficiary which qualify for exemption from federal estate taxation.¹²²

V. AD VALOREM TAXES

In *Tenneco, Inc. v. Polk County*¹²³ the Texas Supreme Court considered the valuation of interstate natural gas transmission pipelines for ad valorem tax purposes. The Beaumont court of civil appeals,¹²⁴ in reversing the trial court, ruled that Polk County's method of determining the fair market value of Tenneco's pipelines within the county was demonstrably wrong. The decision rested on the ground that the capitalization rate utilized by the county's expert witnesses in determining value, if applied to the net book value figure on which the Federal Power Commission ("FPC") calculates the permitted rate of return of an interstate pipeline, would not allow Tenneco sufficient earnings to pay all of the annual dividends on its preferred stock or any dividends on its common stock.

In reversing and remanding the Beaumont court's decision, the Texas Supreme Court determined that application of the capitalization rate to the pipelines' net book value incorrectly assumed that net book value equaled fair market value. Tenneco attempted to justify the use of net book value on the basis that the FPC, in regulating the rates interstate gas pipeline operators may charge for their gas, determines allowable net income by multiplying a rate base by a rate of return figure. Pursuant to FPC regulations, a utility's gas transmission properties are included in the rate base at their net book value. The interstate gas pipeline's income attributable to its pipeline properties, therefore, equals the product of its net book value and the rate of return allowed by the FPC.

The supreme court, however, concluded that the fair market value of the pipeline properties computed according to the income approach would equal the net book value of the properties only if the rate of return required by the average investor would be equal to the rate of return allowed the pipeline company by the FPC. The court stated that if the average investor was willing to accept a rate of return lower than the rate of return allowed by the FPC, then he would be willing to pay more for the pipeline than its net book value. On the other hand, if the investor required a greater rate of return on his money than the rate of return allowed by the FPC, then he would offer less than the net book value for the property. The court held that since there had been no showing at trial that the capitalization rate was equal to the rate

120. See TEX. PROB. CODE ANN. § 47(f) (Vernon 1956).

121. Comptroller's Inheritance Tax Rulings .001 *et seq.*

122. TEX. TAX.-GEN. ANN. art. 14.015(4) (Vernon Supp. 1978).

123. *Polk County v. Tenneco, Inc.*, 554 S.W.2d 918 (Tex. 1977).

124. *Tenneco, Inc. v. Polk County*, 546 S.W.2d 63 (Tex. Civ. App.—Beaumont 1976), *rev'd*, 554 S.W.2d 918 (Tex. 1977).

of return allowed by the FPC, the Beaumont court of civil appeals erred in equating net book value with fair market value for purposes of finding its hypothetical income figure. The court further concluded that there was evidence tending to support the trial court's factual determination of market value and, thus, the court of civil appeals erred in holding that the opinions of value of the county's expert were based upon methodologies or figures so inaccurate as to render those opinions legally insufficient evidence of value.

On remand the Beaumont court affirmed the trial court.¹²⁵ The court placed substantial reliance on the supreme court's holding that there was evidence tending to support the trial court's factual determination of the market value of the pipelines. In a concurring opinion Chief Justice Dies pointed out that while net book value and market value of a pipeline regulated by the FPC are not the same, a prospective buyer would want to stay close to the net book value, unless he was willing to accept a lesser rate of return than the regulatory commission allows. Chief Justice Dies stated that an assessment by any taxing authority of a natural gas pipeline regulated by the FPC should take into account that a prospective purchaser is only interested in buying income and, if that income is wholly regulated by the FPC, the market value of the pipeline primarily would be determined by the allowed income.

Several developments during the survey period concerned the assessment of agricultural lands for ad valorem tax purposes. In *City of Mesquite v. Malouf*¹²⁶ the court considered the applicability of the agricultural assessment provisions of article VIII, section 1-d of the Texas Constitution¹²⁷ to a trust. The trial court had rendered judgment for the taxpayer on the ground that the declaration of trust did not create an existing trust because it was not the trustor's intention to vest the beneficiaries with a present beneficial interest in the land.¹²⁸ Thus, the trustor was the owner of the land in his own right rather than as trustee. The trial court further held that the trustor met the constitutional requirement that agricultural business must be the landowner's primary occupation and source of income, thereby entitling him to the benefits of the agricultural assessment.¹²⁹ Additionally, the trial court concluded that even if the trust did come into existence, the trustor nevertheless was entitled in his capacity as trustee to the agricultural assessment.

The Texarkana court of civil appeals reversed, finding that a valid trust had been created.¹³⁰ For purposes of applying the constitutional provisions

125. *Tenneco, Inc. v. Polk County*, No. 7850 (Tex. Civ. App.—Beaumont, Oct. 27, 1977).

126. 553 S.W.2d 639 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.).

127. TEX. CONST. art. VIII, § 1-d(a) provides:

All land owned by natural persons which is designated for agricultural use in accordance with the provisions of this Section shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use. 'Agricultural use' means the raising of livestock or growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, which business is the primary occupation and source of income of the owner.

128. 553 S.W.2d at 642.

129. *Id.*

130. *Id.* at 643.

governing agricultural assessment to the trust, the court held that when a valid trust is created, the beneficiaries become the owners of the equitable or beneficial title to the trust property and are considered the real owners, while the trustee is only the holder of bare legal title. The court concluded that since the beneficiaries, rather than the trustee, received the benefit of the agricultural assessment, it should be the beneficiaries' primary occupations and sources of income which should determine the applicability of the agricultural assessment. Since no evidence had been presented to the trial court concerning the beneficiaries' primary occupations and sources of income, the court held that the beneficiaries were not entitled to the agricultural assessment.¹³¹

The legislature enacted article 7150k¹³² in 1977 to provide a broader procedure for valuing agricultural land than that provided under article VIII, section 1-d of the Texas Constitution. As originally introduced, the bill provided that it would become effective only upon adoption of a companion constitutional amendment. The bill subsequently emerged from a conference committee without being explicitly dependent on the passage of the constitutional amendment. Thereafter, the proposed constitutional amendment was defeated and article 7150k was enacted.

The Texas attorney general concluded in an opinion that article 7150k, as enacted without the companion constitutional amendment, was unconstitutional in that it provided for an appraisal of property for ad valorem taxes on a basis other than fair market value.¹³³ Two arguments had been advanced by the article's supporters in an effort to uphold its constitutionality. First, it was argued that a companion constitutional amendment was not necessary because the income capitalization method of valuation provided by the article was merely a means of ascertaining market value. Rejecting this argument, the attorney general concluded that article 7150k indicated on its face that the appraisal formulas set out in the bill produced something other than fair market value.¹³⁴ Second, it was argued that a constitutional amendment was unnecessary since the Texas Constitution gives the legislature broad authority to permit valuation of property on a basis other than market value. The attorney general also rejected this argument, relying upon the decision of the Texas Supreme Court in *Lively v. Missouri, K. & T. Ry.*¹³⁵ and other authorities¹³⁶ indicating that the Texas Constitution requires appraisal of all properties on the basis of fair market value.¹³⁷ In another

131. *Id.* at 644.

132. TEX. REV. CIV. STAT. ANN. art. 7150k (Vernon Supp. 1978).

133. TEX. ATT'Y GEN. OP. NO. H-1098 (1977).

134. *Id.*

135. 102 Tex. 545, 120 S.W. 852 (1909).

136. *Rowland v. City of Tyler*, 5 S.W.2d 756, 760 (Tex. Comm'n App. 1928, jdgmt adopted); *Atlantic Richfield Co. v. Warren Independent School Dist.*, 453 S.W.2d 190, 197 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.); *Dietrich v. Phipps*, 438 S.W.2d 900, 902 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ); *Harlingen Independent School Dist. v. Dunlap*, 146 S.W.2d 235, 237 (Tex. Civ. App.—San Antonio 1940, writ ref'd).

137. In TEX. ATT'Y GEN. OP. NO. H-1022 (1977) the attorney general similarly ruled that a constitutional amendment would be required before the legislature could provide for the valuation of one type of property at a smaller percentage of market value than other types of property.

opinion relating to agriculture¹³⁸ the attorney general concluded that livestock and poultry are not "farm products" pursuant to article VIII, section 19 of the Texas Constitution¹³⁹ and thus were not exempt from taxation thereunder.

In *Victor Equipment Co. v. Denton Independent School District*¹⁴⁰ the court followed a prior opinion of the attorney general¹⁴¹ and held that the exemption in article 7150f¹⁴² for goods originating outside of Texas and detained in Texas for a period not more than nine months for assembly, storage, manufacturing, processing, or fabricating purposes should be construed as exempting only consigned goods. The legislature in 1977 amended article 7150f to provide that the exemption applies whether the goods are consigned to or owned by the taxpayer. The amendment provides that goods meeting the article's requirements shall be deemed to be located in the state for only a temporary period and thus do not acquire taxable situs in the state. Prior to amendment, the statute provided that such goods are deemed to move in interstate commerce and, therefore, are exempt from taxation. This change in the basis of the exemption represents an effort to forestall assertions that the exemption, couched in terms of interstate commerce, was void.¹⁴³

Other decisions relating to ad valorem taxes during the survey period are of minimal general interest.¹⁴⁴ Numerous legislative changes pertaining to ad

138. TEX. ATT'Y GEN. OP. NO. H-898 (1976).

139. TEX. CONST. art. VIII, § 19 provides: "Farm products in the hands of the producer, and family supplies for home and farm use, are exempt from all taxation unless otherwise directed by a two-thirds vote of all the members elected to both houses of the Legislature." In TEX. ATT'Y GEN. OP. NO. H-938 (1977) the Texas Attorney General concluded that sugar cane, raw sugar, molasses and/or bagasse held by a cooperative marketing association are "farm products" in the hands of the producer and are exempt from ad valorem taxation.

140. 548 S.W.2d 464 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

141. TEX. ATT'Y GEN. OP. NO. H-479 (1974).

142. TEX. REV. CIV. STAT. ANN. art. 7150f (Vernon Supp. 1978).

143. In 21 J. HOWELL, TEXAS PRACTICE § 69 (Supp. 1977), the author stated the following with respect to article 7150f prior to its amendment in 1977:

The act has been codified as Article 7150f and apparently purports to be a definition of goods moving in interstate commerce. If the definition is not as broad as the commerce clause and the cases construing the same, then the act is either void or inapplicable as far as the United States Constitution is concerned. If the act purports to exempt property that is not exempt under the Texas Constitution or that the Texas Constitution does not grant the Legislature of Texas the power to exempt, then it is void under the Texas Constitution. Thus, where it purports to tax or exempt property that was not already taxed or exempted prior to its passage, it would seem to be void.

144. *Zgliniski v. Hackett*, 552 S.W.2d 933 (Tex. Civ. App.—Austin 1977, no writ) (after the tax rolls have been approved and the plan of taxation put into effect, a taxpayer cannot avail himself of the remedies of injunction and mandamus but may defeat recovery of taxes only to the extent they are excessive); *Gibson v. Kountze Independent School Dist.*, 552 S.W.2d 588 (Tex. Civ. App.—Beaumont 1977, no writ) (taxpayers complaining that the school district had put into effect a program of reappraisal and revaluation of rural lands without any attempt to reappraise or revalue other categories of property in the district must show that such tax plan would result in the taxpayers paying more than their fair share of the taxes, thus discriminating against them by assessing their property at a greater percentage of the true value than the percentage assessed for properties in other categories; the school district was not estopped from offering testimony by the tax assessor that certain rural lands belonging to the plaintiffs were worth more than the one-hundred percent values assigned by the board of equalization); *Hutt v. City of Rocksprings*, 552 S.W.2d 583 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (while it was improper and discriminatory for the city deliberately to omit from assessment almost all personal property except that which was rendered, the taxpayer was not entitled to

valorem taxes related to exemptions,¹⁴⁵ tax foreclosure sales,¹⁴⁶ tax incre-

relief because he did not prove that as a consequence of the illegal plan his taxes were excessive or substantially higher than they would have been had the plan followed proper statutory and constitutional guidelines); *First Nat'l Bank v. Prudential Ins. Co. of America*, 551 S.W.2d 112 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (where city allegedly sold land to corporation for inadequate consideration, taxpayers did not have standing to maintain an action on behalf of the city for recovery of damages or for a declaration that the sale was void and for cancellation of the deed); *Howell v. City of Dallas*, 549 S.W.2d 36 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) (a person who voluntarily pays an illegal ad valorem tax has no claim for repayment, and in the absence of a specific statute, it is immaterial to the right of repayment whether such illegal tax was paid under protest); *Stratton v. Dell Valle Independent School Dist.*, 547 S.W.2d 727 (Tex. Civ. App.—Austin 1977, no writ) (the assessor's consolidation of two tracts of land as one tract which neither harms nor misleads the taxpayer is a valid assessment pursuant to TEX. REV. CIV. STAT. ANN. art. 7351 (Vernon 1960)); *Webb v. L. B. Walker and Assocs.*, 544 S.W.2d 952 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (city tax assessor and collector could not reject renditions because they were sworn to and filed by an agent of the owner rather than the owner himself); *Zavala County v. E.D.K. Ranches, Inc.*, 544 S.W.2d 484 (Tex. Civ. App.—San Antonio 1976, no writ) (where county officials represented to property owners that the board of equalization agreed with the rendered valuations of their properties and would not raise such valuations, and subsequently increased such valuations without notice to the property owners, a temporary injunction was properly granted to protect the status quo of the property owners pending trial on the merits; due process requires that the board of equalization give the taxpayer notice and an opportunity to be heard before increasing the valuation of his property as shown on the tax rolls whether the valuation was made by the owner's rendition or the assessor on behalf of the owner); TEX. ATT'Y GEN. OP. NO. H-1085 (1977) (if a clinic foundation which owns property and the physicians' association which leases the property from the foundation both operate as purely public charities, the property owned by the foundation which is so operated would be exempt from ad valorem taxes); TEX. ATT'Y GEN. OP. NO. H-1059 (1977) (a building owned by a nonprofit corporation and rented to a county as a courthouse was not exempt from taxation as "public property" but might be exempt as an historic site); TEX. ATT'Y GEN. OP. NO. H-894 (1976) (the grant to the surviving spouse and children of a deceased disabled veteran of an exemption from property taxes in an amount equal to that the deceased disabled veteran was entitled to receive at the time of his death applies both to survivors of those disabled veterans who died before the effective date of TEX. REV. CIV. STAT. ANN. art. 7150h (Vernon Supp. 1978) and to survivors of those disabled veterans who died thereafter; article 7150h, §§ 8, 9 require that the amount of the exemption be determined by the percentage of service-connected disability suffered by the deceased at the time of death).

145. See TEX. REV. CIV. STAT. ANN. art. 7150f (Vernon Supp. 1978) (goods, wares, ores, and merchandise originating outside Texas and held within Texas for a period not to exceed nine months for assembly, storage, manufacturing, processing, or fabricating are exempt from taxation whether consigned to or owned by the taxpayer); *id.* art. 7150i (the governing body of any political subdivision may exempt from taxation part or all of the value of a structure, and the land necessary for access and use thereof, if the structure is (1) designated as a Recorded Texas Historical Landmark by the Texas Historical Commission and by the governing body of the taxing unit or (2) designated as a historically significant site that is in need of tax relief to encourage its preservation under an ordinance adopted by the governing body of the taxing unit); *id.* art. 7150, § 22a (exempting from taxation property, not to exceed 1,000 acres in any one county, which is reasonably necessary for and used for the preservation and conservation of wildlife and is owned by a nonprofit corporation meeting certain requirements set forth in the statute); *id.* art. 7150, § 29 (exempting from taxation all real and personal property owned by a nonprofit corporation and held for the exclusive use and development of biomedical educational research).

146. TEX. REV. CIV. STAT. ANN. art. 7328.2 (Vernon Supp. 1978) (providing (1) that the notice of a sale of real property at a tax foreclosure sale or a sale of real property purchased at a tax foreclosure sale by the state or a taxing unit shall specify the hour that the sale will begin and which of the several entrances is the courthouse door where the sale will be held and (2) that such sales may be conducted by the sheriff, deputy sheriff, or an authorized agent of the sheriff and that if an agent is utilized, that the notice of the sale shall contain the name, address, and telephone number of the agent and that a bidder at the sale must be registered at the time the sale begins); *id.* art. 7345b-3 (providing limitations on actions concerning the recovery of real property sold at a tax sale); *id.* art. 7345b, § 8 (providing that anyone claiming excess proceeds from a tax foreclosure sale may file a petition during the three-year period following the sale of the property during which the excess funds are retained by the clerk of the court); *id.* art. 7345b, § 9 (providing that if property is purchased by a taxing unit at a tax foreclosure sale, the taxing unit must preserve the property by reasonable means until the property is redeemed or sold, and any rental income derived from the property during the redemption period shall be used to maintain and improve the property).

ment financing,¹⁴⁷ special valuation procedures,¹⁴⁸ and various other matters.¹⁴⁹

A significant legislative development during the survey period was the enactment of article 7345f¹⁵⁰ which provides a new procedure for appealing the decision of a board of equalization. The statute provides that a property owner is entitled to appeal the decision of a board of equalization to a district court by filing a petition for review with such court within forty-five days after the tax roll containing the value involved is approved by the taxing authority.¹⁵¹ Venue is in the county in which the board of equalization that made the decision is located,¹⁵² and any party to the proceeding is entitled to a trial by jury on demand.¹⁵³ The issue to be decided on appeal is whether or not the value of the property in question as ascertained by the board of equalization is in error.¹⁵⁴ If the court or jury finds that the value is in error, then the court or jury shall set the value for the property as of January 1 of the tax year in controversy.¹⁵⁵ The value affixed by the court or

147. The Texas Tax Increment Act of 1977, TEX. REV. CIV. STAT. ANN. art. 1066d (Vernon Supp. 1978) authorizes municipalities to create redevelopment districts (as defined in the Act) and to issue tax increment bonds to finance redevelopment plans with respect to such districts. The Act takes effect only if and when the constitutional amendment proposed by Senate Joint Resolution No. 44 is adopted. Such Senate Joint Resolution is to be submitted to the electorate in November 1978.

148. TEX. REV. CIV. STAT. ANN. art. 7150n (Vernon Supp. 1978) (providing that land designated for recreational, park, or open-space purposes for a period of ten or more years by a restriction instrument filed by the owner of the tract with the county clerk shall be appraised by the tax assessor on the basis of no factor other than those relative to the value of the land as restricted); *id.* art. 7174(d) (providing that an interest in a mineral which may be removed by surface mining or quarrying from a deposit that is not being produced shall be valued at the price for which the interest would sell while the mineral is in place and not being produced, such value to be determined by applying a per acre value to the number of acres covered by the interest); *id.* art. 7150l (providing that common areas of a subdivision owned by a nonprofit association or corporation maintaining nominal ownership to such property which is held for the use, benefit, and enjoyment of the members of such association or corporation will be assessed at a nominal value, provided the nonprofit association or corporation meets certain requirements; in appraising individual properties owned by members of the association or corporation who are entitled to the use and enjoyment of the facilities owned by the association or corporation, the enhanced value of the individual properties because of the right to the use and benefit of a facility shall be a factor taken into consideration by the appraiser); *id.* art. 7174 (providing that the value of a taxable leasehold estate may not be less than the total annual rental for the leasehold for the year in which it is valued).

149. TEX. REV. CIV. STAT. ANN. art. 7173(a) (Vernon Supp. 1978) (describing specifically the types of uses of airport terminals that are excepted from the operation of art. 7173); *id.* art. 7150m (defining a "planned unit development" as a real property development project in which the owners of individual parcels of real property in the development each have a membership in the association that owns and maintains property in the development for use of its members and providing that a property tax on such property owned by the association may be assessed proportionately against each member of the association if the association files with the tax collector a resolution adopted by the majority vote of all members of the association authorizing the proportionate assessment); *id.* art. 7329a (clarifying the procedure for deferring or abating the collection of delinquent taxes on the homesteads of persons sixty-five years or older); *id.* art. 7261a (providing a list of certain taxes and fees with respect to which a tax collector may, but is not required to, accept a check for payment); *id.* art. 1066b, § 1 (providing that any municipality or district located entirely or partly within the boundaries of another municipality or district is empowered to authorize the tax assessor, board of equalization, and tax collector of the municipality or district in which it is located, entirely or partly, to act as its tax assessor, board of equalization, and tax collector).

150. TEX. REV. CIV. STAT. ANN. art. 7345f (Vernon Supp. 1978).

151. *Id.* § 1.

152. *Id.* § 2.

153. *Id.* § 3.

154. *Id.* § 4(a).

155. *Id.* § 4(b).

jury shall be binding on the taxing authority involved in the litigation for the tax year in question and for the succeeding year, provided that in the succeeding tax year the taxing authority may add the value of subsequent improvements to the property to the value affixed by the court or jury.¹⁵⁶

The taxing authority may assert as a defense to an appeal under article 7345f that the taxpayer failed to exercise good faith in setting forth the fair market value of the property in the rendition. The statute specifically provides that a taxpayer does not fail to exercise good faith if he makes a good faith effort to estimate the cash market value of the property and renders the value determined by multiplying his estimate of cash market value by the assessment ratio in effect. The statute requires that a taxpayer must file a sworn affidavit with the board of equalization prior to invoking the provisions of article 7345f, but shall not be required to appear personally or by a representative before the board of equalization.¹⁵⁷ While the rights afforded taxpayers pursuant to article 7345f are cumulative and do not preempt other remedies granted by statute or evolving by common law,¹⁵⁸ article 7345f does not expand upon taxpayers' rights to sue for an injunction or restraining order as a member of a class.¹⁵⁹ Furthermore, the rights granted pursuant to article 7345f are specifically prohibited from being the basis of injunctive or restraining order relief in a class action to enjoin a taxing authority's tax plan.¹⁶⁰

The enactment of article 7345f is a tremendous stride towards providing relief to taxpayers whose properties have been assessed by taxing authorities based on excessive values. The statute, however, does not ease the onerous burden placed on taxpayers seeking to attack plans of taxation where properties within the taxing jurisdiction are assessed at different effective assessment ratios, where taxing jurisdictions deliberately omit certain types of personal property, including intangibles, from the tax base, or where taxing authorities fail to appraise all properties within the taxing jurisdiction at fair market value. Additional reform is clearly needed.¹⁶¹

VI. MOTOR VEHICLE SALES AND USE TAXES

There was also substantial legislative change in the motor vehicle sales and use tax area. A major problem under prior law concerned the distinction between "rental or renting"¹⁶² and "lease or leasing."¹⁶³ The purchaser of a motor vehicle to be used for lease or leasing was previously required to pay a motor vehicle sales tax at the time of purchase on the total consideration

156. *Id.* § 4(c).

157. *Id.* § 5.

158. *Id.* § 6.

159. *Id.* § 7.

160. *Id.*

161. An excellent critique of the Texas property tax system and the onerous burdens placed on taxpayers seeking to invalidate illegal assessments is contained in Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEXAS L. REV. 885 (1973). See also Levatino & Bickerstaff, *The Proposed Constitution for Texas*, 29 SW. L.J. 477, 495-505 (1975); Comment, *Equality in Taxation—Houston's Constitutional Dilemma*, 10 HOUS. L. REV. 656 (1973).

162. TEX. TAX.-GEN. ANN. art. 6.03(E) (Vernon Supp. 1978).

163. *Id.* art. 6.03(F). Both terms dealt with giving exclusive use of a motor vehicle to another for a consideration. If the time period was under thirty-one days the transaction would be termed renting. If the time period exceeded thirty-one days it would be termed a lease.

paid for the motor vehicle,¹⁶⁴ while a motor vehicle purchased for purposes of rental or renting was only required to collect a tax on gross rental receipts.¹⁶⁵ In the event the motor vehicle was used both for rental or renting and lease or leasing, the owner was required to pay both a motor vehicle sales tax at the time the motor vehicle was purchased and collect and pay a gross rental receipts tax on the rental of the motor vehicle for periods less than thirty-one days. This amounted to double taxation on motor vehicles used for both rental and leasing.

The new legislation alleviates this problem in several ways. First, the definition of rental or renting has been amended to define the holding period as "not to exceed 180 days under any one agreement."¹⁶⁶ In addition, the term "rental" also includes "any agreement by an original manufacturer of motor vehicles to give exclusive use of a motor vehicle to another for consideration and any agreement to give exclusive use of a motor vehicle to another for re-rental purposes, regardless of the period of time covered by the agreement."¹⁶⁷ The definition of lease or leasing has been amended correspondingly to mean to give exclusive use of a motor vehicle to another for a period of time exceeding 180 days.¹⁶⁸ This change in definition will necessarily cause a significantly larger number of motor vehicles to fall solely within the rental or renting category.

Perhaps most importantly, the amendments add a new article 6.04(6),¹⁶⁹ which provides that when a motor vehicle upon which the motor vehicle sales and use tax has been paid is used for rental, the owner shall collect the gross rental receipts tax from the person renting the vehicle, and then receive a credit equal to the motor vehicle sales or use tax previously paid with respect to the vehicle. Article 6.04(6) thus effectively eliminates the double taxation under prior law by entitling the owner of the motor vehicle to credit the motor vehicle sales or use tax previously paid with respect to the vehicle against the amount of gross rental receipts tax collected.

Other amendments to the motor vehicle sales and use tax law involve procedural matters relating to registration and payment of tax on motor vehicles¹⁷⁰ and exemptions from the tax.¹⁷¹

164. *Id.* art. 6.01(1).

165. *Id.* arts. 6.01(6), 6.04.

166. TEX. TAX.-GEN. ANN. art. 6.03(E) (Vernon Supp. 1978).

167. *Id.*

168. *Id.* art. 6.03(F).

169. *Id.* art. 6.04(6).

170. TEX. TAX.-GEN. ANN. art. 6.01(1) (Vernon Supp. 1978); *id.* art. 6.041; *id.* art. 6.05; *id.* art. 6.06(1).

171. TEX. TAX.-GEN. ANN. art. 6.09(3) (Vernon Supp. 1978) (exempting the sale of a motor vehicle to or use of a motor vehicle by a public agency, provided the vehicle is operated with exempt license plates); *id.* art. 6.09(3) (exempting the receipts from the sale or rental and the use of a motor vehicle that is designed to carry more than six passengers, is sold to or used by a church or religious society and is used primarily for the purpose of providing transportation to and from church or religious services or meetings; the exemption does not apply to a vehicle registered as a passenger vehicle and the primary use of which is for the personal or official needs or duties of a minister); *id.* art. 6.09(3) (exempting from taxes receipts from the sale and use of a motor vehicle that is driven primarily by an orthopedically handicapped person, which is defined as a person so physically impaired that he is unable to operate a motor vehicle which has not been specially modified; the exemption extends to privately owned vehicles which require modification for operation by an orthopedically handicapped person, but does not extend to any vehicle owned or operated by any corporation, partnership, limited partnership or association); *id.* art. 6.09(4) (exempting from the gross rental receipts tax the rental of a motor

VII. FEDERAL AND MISCELLANEOUS STATE TAX MATTERS

There were several legislative changes and court decisions concerning various state tax matters during the survey period which are of little general interest. Included in this category are matters relating to employment taxes,¹⁷² cigarette taxes,¹⁷³ motor fuel taxes,¹⁷⁴ the authority of the comptroller to compromise tax liabilities,¹⁷⁵ the confidentiality of federal tax information provided to the comptroller,¹⁷⁶ the issuance of warrants by the state,¹⁷⁷ cigar taxes,¹⁷⁸ mixed beverage gross receipts taxes,¹⁷⁹ gross receipt taxes,¹⁸⁰ and

vehicle to a public agency, provided that the tax which would have been remitted on gross rental receipts without such exemption shall be deemed to have been remitted for the purpose of calculating the minimum gross rental receipts due and payable to the comptroller pursuant to art. 6.01(6)); *id.* art. 6.09(5) (providing that the tax on gross rental receipts does not apply to the rental of a motor vehicle for the purpose of re-rental and providing further for the issuance of an exemption certificate by a person authorized by art. 6.041 to register motor vehicles for rental).

172. *Guinn v. State*, 551 S.W.2d 783 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.) (certain provisions of Texas Unemployment Compensation Act calling for employer contributions and imposing penalties on employer for failure to make timely filing of wage reports were held to be constitutional); *Texas Employment Comm'n v. Johnnie Dodd Automotive Enterprises, Inc.*, 551 S.W.2d 171 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) (the Texas Employment Commission erred in summarily denying an employer's protest of notice of maximum potential unemployment compensation tax chargeback without consideration of the merits of such protest on the incorrect basis that the employer was mailed a copy of the former employee's claim but did not protest it; constitutional due process requires an administrative agency to accord a full and fair hearing on all disputed fact issues critical to the rights of the parties on a question before it).

173. *Merchants Fast Motor Lines, Inc. v. Bullock*, 548 S.W.2d 478 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.) (a common carrier which transported cigarettes from one point to another within the state, but was not licensed for any purpose under the cigarette tax law, did not receive cigarettes for purpose of making a "first sale" so as to be liable for taxes under the cigarette tax law).

174. *Nu-Way Oil v. Bullock*, 546 S.W.2d 336 (Tex. Civ. App.—Austin 1976, no writ) (the comptroller may rely on a *prima facie* presumption that all sales of motor fuel are taxable, and the burden rests on taxpayers to establish what became of fuel that was unaccounted for).

175. TEX. TAX.-GEN. ANN. art. 1.032A (Vernon Supp. 1978) provides that the comptroller may compromise or settle any tax liability, including penalty and interest due the State of Texas, in an order or decision of the comptroller upon a petition for redetermination if: (1) the cost of collection exceeds the amount of tax due, provided the total amount of tax due does not exceed \$1,000; or (2) the taxpayer is in liquidation, insolvent, or has ceased to do business and has no property or insufficient property that may be seized to satisfy the tax liability; or (3) collection of the entire tax due would make the taxpayer insolvent. Subsequent to an examination of the taxpayer's records and prior to a redetermination proceeding, the comptroller or his designee may compromise or settle any tax liability, including penalty and interest, if the cost of collection exceeds the amount of tax due and the total amount of tax due does not exceed \$300. Such compromise or settlement must be approved by the assistant comptroller for legal services. Finally, the comptroller or his designee may compromise or settle any penalty or interest if the taxpayer exercised reasonable diligence to comply with the provisions of Title 122A. Such compromise or settlement similarly must be approved by the assistant comptroller for legal services.

176. TEX. TAX.-GEN. ANN. art. 1.035 (Vernon Supp. 1978) provides that in the event any person is required to submit any federal tax return or include federal tax return information with a state tax return or report, such federal return or return information shall be confidential. No official, employee, or former official or employee of the comptroller shall disclose any such federal tax return or return information except for the purposes of a judicial proceeding for the collection of delinquent taxes in which the state is a party. Any present or former official or employee of the comptroller who wrongfully discloses such information shall be punished by a fine not exceeding \$1,000 or confinement in a jail not exceeding one year, or both.

177. TEX. REV. CIV. STAT. ANN. art. 4350 (Vernon Supp. 1978) (providing that no warrant shall be issued to any person indebted or owing delinquent taxes to the state until such debt or taxes are paid).

178. TEX. TAX.-GEN. ANN. art. 8.02 (Vernon Supp. 1978) (amending cigar and tobacco products tax rate schedules).

179. TEX. PEN. CODE AUX. LAWS art. 666-11b (Vernon Supp. 1978) (an original or renewal permit authorizing the retail sale of alcoholic beverages cannot be issued unless the applicant

hotel occupancy taxes.¹⁸¹

A significant development in the federal estate tax area relating to Texas law is the decision of the Tax Court in *Estate of Castleberry v. Commissioner*.¹⁸² During his marriage, the decedent, a Texas resident, had made gifts to his wife of his one-half community interest in several municipal bonds. On the federal estate tax return, the value of these bonds was not included in the decedent's gross estate. The Internal Revenue Service asserted that the fair market value of the decedent's one-half interest in these bonds was includable in the decedent's gross estate pursuant to section 2036(a)(1)¹⁸³ of the Internal Revenue Code of 1954 on the ground that the decedent by operation of state law held a community property interest in the income from the bonds, even though he had not explicitly or implicitly retained such an interest under the transfer instrument. The Tax Court held that one-half of the decedent's one-half community interest, or one-quarter of the whole value of the bonds, was includable in the decedent's gross estate pursuant to section 2036(a)(1). In so holding the court reaffirmed the position it previously had taken in *Estate of Hinds v. Commissioner*.¹⁸⁴

The decedent's estate advanced three arguments in support of its contention that section 2036(a)(1) is inapplicable to transfers of a Texas community property interest by one spouse to another, where the donor-spouse continues to hold a community property right to the income by operation of

files with his application a certificate issued by the comptroller stating that the applicant holds, or has applied for and satisfies all the requirements for the issuance of, a sales tax permit, if required, for the place of business for which the alcoholic beverage permit is sought; a permit may be suspended or cancelled if it is found, after notice and hearing, that the permittee no longer holds a sales tax permit, if required, or that the permittee is shown on the records of the comptroller as being subject to a final determination for state or local sales taxes due and payable); *id.* art. 666-20d(f) (providing that certificates of deposit or savings and letters of credit are acceptable in place of a bond if approved by the administrator); *id.* art. 667-5G (providing the same requirements for issuance of an original or renewal retail dealer's or retail dealer's on-premise license as are provided in article 666-11b).

180. TEX. REV. CIV. STAT. ANN. art. 8501-1, § 11 (Vernon Supp. 1978) is amended to provide that any person who conducts a boxing or wrestling match, contest, or exhibition wherein an admission fee is charged shall furnish to the Texas Department of Labor and Standards within seventy-two hours, rather than forty-eight hours, after the termination of the event a report showing the number of tickets sold, prices charged, and the amount of gross receipts obtained from the event and a tax payment based on three percent of the total gross receipts of the event. The three percent gross receipts tax, as opposed to the admissions tax imposed by TEX. TAX.-GEN. ANN. arts. 21.01-.04 (Vernon 1969), applies to admission fees for exhibiting a simultaneous telecast of any live, spontaneous or current boxing or wrestling match, contest, or exhibition on a closed circuit telecast.

181. TEX. REV. CIV. STAT. ANN. art. 1269j-4.1, § 3c(a) (Vernon Supp. 1978) (providing that revenues derived from the hotel occupancy tax may be used for civic theaters, museums, the encouragement, promotion, improvement, and application of the arts, and historical preservation and restoration); *id.* art. 1269j-4.1, § 3a (increasing the maximum tax to four percent); *id.* art. 1269j-4.1, § 3c(b) (providing for the amount of hotel occupancy taxes which must be reserved by the city for the purpose of advertising public meeting and convention facilities and promoting tourism).

182. 68 T.C. 682 (1977).

183. I.R.C. § 2036(a)(1) provides:

(a) GENERAL RULE.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property . . .

184. 11 T.C. 314 (1948), *aff'd on other grounds*, 180 F.2d 930 (5th Cir. 1950).

state law. First, the estate argued that the decedent retained no interest in the income from the bonds within the meaning of section 2036(a)(1), because there was no agreement, prearrangement, or understanding, either expressed or implied, between the donor and donee providing for such retention. Rejecting this contention, the court concluded that section 2036(a)(1) applies where the donor holds an income interest in transferred property by operation of state law as well as where he expressly or impliedly retains the interest under the transfer instrument.

The estate's second argument was that even if the decedent had "retained" an interest, it was not retained "under" the transfer as required by section 2036(a)(1). The court similarly rejected this argument, relying primarily upon a prior decision of the Court of Appeals for the Third Circuit.¹⁸⁵

The estate's final argument was that the decedent did not retain the possession or enjoyment of, or the right to the income from, the transferred property pursuant to Texas law. Relying upon Texas statutes, the estate argued that pursuant to Texas law the decedent's wife had the sole management, control, and disposition of the transferred property,¹⁸⁶ and was free to deal with the community income from the transferred property without the participation, interference, or consent of the decedent.¹⁸⁷ Further, the estate asserted that under Texas law the community income was not subject to any debts contracted by the decedent.¹⁸⁸ Disagreeing with the estate's views, the court held that the decedent's wife's control over the transferred property and community income was not absolute and adverse to the decedent's interest and was not equivalent to ownership of the community income. Relying upon various Texas authorities governing the status of community income, the court concluded that the decedent's right to such income was not illusory, but was an enforceable right sufficient to require inclusion of a portion of the transferred property in his gross estate pursuant to section 2036(a)(1).

Relying upon *Estate of Bomash v. Commissioner*,¹⁸⁹ the Internal Revenue Service urged the court to reconsider its decision in *Estate of Hinds*¹⁹⁰ and

185. *Estate of McNichol v. Commissioner*, 265 F.2d 667, 670 (3d Cir.), cert. denied, 361 U.S. 829 (1959).

186. TEX. FAM. CODE ANN. § 5.21 (Vernon 1975).

187. *Id.* § 5.22.

188. *Id.* § 5.61.

189. 432 F.2d 308 (9th Cir. 1970), rev'g 50 T.C. 667 (1968).

190. In *Estate of Hinds v. Commissioner*, 11 T.C. 314 (1948), *aff'd on other grounds*, 180 F.2d 930 (5th Cir. 1950), the Tax Court held that a transfer of the type involved in the *Castleberry* case fell within the scope of the predecessor of section 2036(a)(1) and that one-half of the value of the decedent's community interest in the transferred property (one-quarter of the whole) was includable in his gross estate. On appeal, the Internal Revenue Service argued that the entire value of the decedent's community interest in the transferred property was includable in his gross estate. The taxpayer did not appeal the Tax Court's decision because she thought the amount of tax imposed pursuant to the decision was too small to justify further litigation. Upon appeal by the Internal Revenue Service, however, the taxpayer urged that the Tax Court decision should be affirmed, not because it was right, but because it gave the Internal Revenue Service more than it was entitled to and thus the Internal Revenue Service could not complain of it. The Court of Appeals for the Fifth Circuit agreed with the taxpayer and affirmed the Tax Court's decision without approving it. In so doing the Court of Appeals for the Fifth Circuit stated:

hold that the entire value of the decedent's one-half community interest in the bonds was includable in his gross estate on the ground that prior to the transfer the decedent had a right to one-half of the income from the bonds, which at that time were community property, and after the transfer the decedent still had a right pursuant to Texas law to one-half of the income from the bonds (which then were the wife's separate property). The estate countered that at most only one-half of the value of the decedent's one-half community interest in the bonds (or one-quarter of the total value of the bonds) should be included in his gross estate, because he *retained* only a one-half community interest in the income from the portion of the bonds he transferred to his wife.

In holding that the decedent's gross estate included only one-half of the transferred share (one-quarter of the whole), the court reasoned that the decedent *retained* a right to only one-half of the income from the interest in the bonds transferred to his wife. Refusing to follow the position asserted by the Internal Revenue Service, the court stated that such position ignored applicable provisions of the Treasury Regulations.¹⁹¹ Further, the court pointed out that unlike *Estate of Bomash*, in the case before it there were no reciprocal transfers made by the decedent and his wife which would give rise to the reciprocal trust doctrine.

In a concurring opinion, Judge Tannenwald agreed with the result reached by the majority on the ground that under the *Golsen* rule¹⁹² the position of the Internal Revenue Service had to be rejected on the authority of *Estate of Hinds*.¹⁹³ Judge Tannenwald stated, however, that absent *Golsen*, he would adopt the reasoning of the decision in *Estate of Bomash* and sustain the position taken by the Internal Revenue Service.¹⁹⁴ Judge Fay, concurring and dissenting, concurred with the majority's conclusion that a portion of

We agree with the taxpayer. Without, therefore, at all approving the decision of the Tax Court, or deciding the point so much labored here by the commissioner and taxpayer, but unnecessary to the decision of this case, whether the income from the property was, within the decision of Commissioner of Internal Revenue v. Porter, 5 Cir., 148 F.2d 566, community property, we deny the petition for review. We do this upon the authority of the settled law of Texas,² that whether the income be regarded as separate property of the wife or as community income from the wife's separate property, the taxpayer retained neither 'the possession or enjoyment of, or the right to the income from' the property so as to make applicable Sec. 811(c)(1)(B), invoked by the commissioner *and in part applied by the Tax Court*.

2. Art. 4614, Tex. Rev. Stat. of 1925, Vernon's Ann. Civ. St. art. 4614; Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799; Hawkins v. Britton State Bank, 122 Tex. 69, 52 S.W.2d 243; In re Gutierrez, D.C., 33 F.2d 987; Whitney Hardware Co. v. McMahan, 111 Tex. 242, 231 S.W. 694.

180 F.2d at 932.

In Rev. Rul. 75-504, 1975-2 C.B. 363, the Internal Revenue Service declined to follow the above-quoted language from *Estate of Hinds* and ruled that where a husband gave his wife cash from his separate property which was placed by the wife in a savings account, one-half of the fair market value of the savings account on the date of the husband's death was includable in his gross estate as a transfer with a retained interest pursuant to section 2036(a)(1).

191. Treas. Reg. 20.2036-1(a).

192. In *Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff'd on another issue*, 445 F.2d 985 (10th Cir. 1971), the court stated where the court of appeals to which appeal of a Tax Court case lies already has passed upon the issue before the Tax Court, the Tax Court will follow the decision of that court of appeals.

193. 68 T.C. at 693 (Tannenwald, J., concurring).

194. *Id.*

the transferred property was includable in the decedent's gross estate under section 2036(a)(1), but stated that he would include the entire value of the transferred share in the decedent's gross estate pursuant to the reasoning in *Estate of Bomash*.¹⁹⁵ Judge Featherston, dissenting, viewed the reasoning of the Court of Appeals for the Fifth Circuit in *Estate of Hinds* as dictating a holding that the decedent did not retain her right to the income from the transferred bonds within the meaning of section 2036(a)(1).¹⁹⁶

The *Castleberry* decision unquestionably has created significant problems with respect to estate planning in Texas. Definite guidelines cannot be set forth until this issue is considered by the appellate courts.

195. *Id.* (Fay, J., concurring and dissenting).

196. *Id.* at 694-96 (Featherston, J., dissenting).